has indicated that, while "cable companies have recently announced their intention to aggressively enter the *Small Business segment*...AT&T has seen very limited activity and we do not expect a significant threat to come from the cable companies."[57] Independent analysts agree that cable companies are generally not competing to provide service to medium and large business customers (those demanding DS-1 and DS-3 level services), "due to MSOs' lack of national and international footprint, and the stringent requirements of enterprise telecommunications."[58] Larger businesses "require service level agreements (SLA), a broader array of services and a wider presence" than cable companies apparently provide today in most locations. *Id.*

While Verizon and other ILECs may claim in their pleadings to the FCC that cable companies are important competitors in the market for DS-1 and DS-3 service, their statements to analysts indicate otherwise. When asked by a Wall Street analyst whether BellSouth was "seeing competition on the small-, medium-sized enterprise space," BellSouth CFO Pat Shannon responded "Not any -- I am sure that our guys see some of them. Some of the better players, like Cox and Time Warner, but it has not risen to a level that I have seen any trends that I could share with you..."[59] In its most recent earnings call, AT&T said this of Cox's efforts in the business market: "They are looking to migrate some of their consumer products predominantly and migrate that into some small business customers. I think their focus will be on the smaller

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[57] Lehman Brothers Equity Research, *AT&T: 3Q Reflects Improving Business Trends*, at 3 (Oct. 24, 2006) (emphasis added).

[58] Jim Duffy, *Cable Companies Intensify Enterprise Service Ambitions*, Network World, Oct. 24, 2006, *available at* http://www.networkworld.com/news/2006/102406-cable.html?page=1.

[59] *See* BellSouth Corp., *BellSouth Q2 Earnings Conference Call Transcript (BLS)*, at 15 (July 24, 2006).

customers, kind of ten lines and under probably four to six lines and under frankly, and when you look at that with respect to our business, that total is only at about the mid single-digits range of our total business. So, it's a sub-segment of the market we go after in small, medium business."[60]

Analysts believe that, because of the difficulties and barriers to fiber loop deployment, it will be difficult for cable companies to substantially penetrate the market for businesses that demand fiber-based DS-1 and DS-3 services. To the extent that cable companies serve the business market, they will reportedly need to rely on other carriers' facilities, just as intramodal competitors do. Cable companies will need to "[s]titch[] together [networks] that reach through multiple providers" and this will require "multiple contractual arrangements."[61] Indeed, the head of Cox's business services division notes that Cox will be able to overcome its limited footprint only by interconnecting with other carriers. *Id.* Even if cable companies are able to deliver enterprise class services, they must overcome the apparent perception, carried over from their traditional HFC-based services, that their networks do not provide enterprise class reliability.[62]

In sum, cable companies still have significant barriers to overcome in serving the DS-1 and DS-3 market to any substantial degree. Even if they could overcome these barriers in some locations in several years time with unforeseen technologies or unannounced network expansions, such developments are irrelevant as to whether cable companies are "ready, willing

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[60] *See* AT&T Corp., *AT&T Q3 Earnings Conference Call Transcript* (T), at 7 (Jan. 25, 2007).

[61] Jim Duffy, *supra* note 59.

[62] According to market tracker Ovum/RHK "CIOs at large companies are less apt to trust their mission critical operations and network to cable companies which are relatively new entrants to the market and are not known for having networks with five nines of reliability...MSOs still have a long way to go to erase that perception and prove that they are every bit as capable as the big telcos." *Id.* (quoting Ovum/RHK/s analyst Ken Twist).

and able" to serve enterprise customers today in the six MSAs within a "commercially reasonable time." Finally, if cable companies do develop the ability to provide DS-1 or DS-3 circuits to businesses, the presence of a single facilities-based competitor would be insufficient to give Verizon "very strong market incentives" to offer DS-1 or DS-3 facilities to competitors in the downstream retail market, as McLeodUSA's experience in Omaha demonstrates.

IV. VERIZON'S ADDITIONAL REQUESTS FOR RELIEF SHOULD BE DENIED.

Verizon's request for forbearance from other common carrier requirements is no more meritorious than its request for the elimination of UNEs. In a footnote in each of its six petitions, Verizon seeks forbearance from dominant carrier tariffing requirements, price cap regulation, *Computer III* regulations including CEI and ONA requirements, dominant carrier rules under 214 and the rules concerning line acquisitions, discontinuing services, assignments or transfers of control and acquiring affiliations. *See, e.g., NY MSA Petition* n.3. Verizon barely even attempts to support these requests with evidence or reasoned argument.

Especially with respect to transmission services that CLECs require as an input to provide services to businesses, this request is completely unfounded. Verizon has not shown that its market power over facilities necessary to provide services to businesses in the six markets for which it seeks forbearance has significantly diminished over the past several years. As explained in Section III above, the available data indicates that Verizon continues to have overwhelming market power in the provision of local transmission facilities needed to serve business customers.

If Verizon's request for relief from dominant carrier and other existing regulations were granted, the result is predictable. Removing all forms of price regulation from an entity with an over 90 percent market share of bottleneck transmission facilities will result in the elimination of competition that relies on such facilities. The Commission only need look at what has happened

to McLeodUSA in Omaha to observe the likely outcome in the markets where Verizon seeks relief.

V. CONCLUSION.

For the reasons described herein, Verizon's petitions for forbearance should be denied.

Respectfully submitted,

/s/

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Jonathan Lechter

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ATTORNEYS FOR TIME WARNER TELECOM, CBEYOND AND ONE COMMUNICATIONS

March 5, 2007

Exhibit A

[REDACTED]

Exhibit B

[REDACTED]

ATTACHMENT D

REDACTED - FOR PUBLIC INSPECTION

WILLKIE FARR & GALLAGHER LLP

1875 K Street, NW
Washington, DC 20006

Tel: 202 303 1000
Fax: 202 303 2000

VIA ECFS

September 13, 2007 ***ERRATUM***

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *In re Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. s 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas,* WC Docket No. 07-97

Dear Ms. Dortch:

On August 31, 2007, a joint Opposition was filed in the above-referenced docket on behalf of Time Warner Telecom Inc., Cbeyond Inc., and Eschelon Telecom, Inc. ("Joint Commenters"). The public version of the Opposition filed via ECFS contained certain information incorrectly identified as public. Therefore, Joint Commenters are submitting, through their undersigned counsel, the attached revised public version of the Opposition.

Please do not hesitate to contact me if you have any questions.

Respectfully submitted,

Nirali Patel

Counsel for Time Warner Telecom Inc., Cbeyond Inc., and Eschelon Telecom, Inc.

Attachment

REDACTED - FOR PUBLIC INSPECTION

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
	)	
Petitions of Qwest Corporation for Forbearance	)	WC Docket No. 07-97
Pursuant to 47 U.S.C. § 160(c) in the Denver,	)	
Minneapolis-St. Paul, Phoenix, and Seattle	)	
Metropolitan Statistical Areas	)	

OPPOSITION OF TIME WARNER TELECOM INC., CBEYOND INC., AND ESCHELON TELECOM, INC.

WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, D.C. 20006
(202) 303-1000

August 31, 2007

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
	)	
Petitions of Qwest Corporation for Forbearance	)	
Pursuant to 47 U.S.C. § 160(c) in the Denver,	)	WC Docket No. 07-97
Minneapolis-St. Paul, Phoenix, and Seattle	)	
Metropolitan Statistical Areas	)	

OPPOSITION OF TIME WARNER TELECOM INC., CBEYOND INC., AND ESCHELON TELECOM, INC.

Time Warner Telecom Inc. ("TWTC"), Cbeyond Inc. ("Cbeyond") and Eschelon Telecom, Inc. ("Eschelon") (collectively, the "Joint Commenters"), by their attorneys, hereby submit this opposition to four petitions for forbearance from unbundling and other regulations filed by Qwest Corporation ("Qwest") in the above referenced docket.[1] As discussed below, the Joint Commenters oppose the Qwest petitions to the extent that those petitions seek forbearance from unbundling and other regulations governing access to Qwest local loop and transport facilities needed to serve business customers.[2]

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[1] *See Pleading Cycle Established for Comments on Qwest's Petitions for Forbearance in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, Public Notice, 22 FCC Rcd. 10126 (WCB rel. June 1, 2007).

[2] Unlike its petition for forbearance for Omaha, Qwest does not explicitly request forbearance from dominant carrier regulation governing its provision of special access services in the four MSAs at issue in this proceeding. The Joint Commenters have not therefore addressed the need for dominant carrier regulation for special access services in this opposition. Nevertheless, if the

I. INTRODUCTION AND SUMMARY.

In its petitions for forbearance from unbundling and dominant carrier regulation in Denver, Minneapolis, Phoenix and Seattle, Qwest expresses what is no doubt a sincere desire that the Commission cease regulating Qwest's local loop and transport facilities. But Qwest offers virtually nothing in support of this request except empty rhetoric and assertions that are plainly unpersuasive or irrelevant. In fact, by any measure, Qwest retains overwhelming market power over the DS-0, DS-1 and DS-3 loops and in many cases, DS-1 and DS-3 interoffice transport facilities, needed to serve business customers in the four MSAs in question. If the Commission were to deregulate Qwest in the provision of these services, Qwest would be free to act on its powerful incentives to increase wholesale prices, drive competitors from the market and deprive business customers of the lower prices and innovation yielded by competitive markets. The Commission must therefore deny the petitions at least as they pertain to loop and transport facilities needed to serve business customers.

To begin with, there is little doubt that Qwest owns the only local transmission facilities serving the vast majority of commercial buildings in the four MSAs at issue. This is true even when cable companies and other intermodal providers are accounted for. For example, the GAO concluded that competitors have deployed loop facilities to only 5.7 percent of the commercial buildings with demand of DS-1 or greater in Minneapolis, 3.7 percent of such buildings in

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Commission were to somehow read the petitions as encompassing a request for the elimination of dominant special access carrier regulation (and it is hard to see how it could do so), all of the information provided herein demonstrates that dominant carrier regulation remains essential to constrain Qwest's exercise of market power in the provision of special access services in the four MSAs for which Qwest has sought forbearance.

Phoenix and 3.8 percent of such buildings in Seattle. While the GAO did not include Denver in its study, Qwest has offered no basis for concluding that there is more competition there than in the other three MSAs.

The data available regarding intramodal competitors' deployment of loop facilities needed to serve business customers confirms Qwest's dominance in all four MSAs at issue. For example, TWTC focuses on serving large and medium-sized business customers, and it constructs loops wherever possible. Nevertheless, TWTC has only been able to construct its own loops to **[proprietary begin]** **[proprietary end]** of the commercial buildings in Denver, **[proprietary begin]** **[proprietary end]** of the commercial buildings in Minneapolis, **[proprietary begin]** **[proprietary end]** of the commercial buildings in Phoenix, and **[proprietary begin]** **[proprietary end]** of the commercial buildings in Seattle.

Moreover, there is no basis for concluding that intramodal competitors can reduce Qwest's overwhelming dominance over loop facilities in the foreseeable future. Based on a detailed study of the commercial buildings in the four MSAs at issue, TWTC determined that, even under favorable conditions, it is theoretically possible for it to deploy loops to only **[proprietary begin]** **[proprietary end]** of the commercial buildings in Denver to which TWTC has not already deployed loops and that have two DS-1s of demand or greater, **[proprietary begin]** **[proprietary end]** of such buildings in Minneapolis, **[proprietary begin]** **[proprietary end]** of such buildings in Phoenix, and **[proprietary begin]** **[proprietary end]** of such buildings in Seattle. Other

competitors are likely to face the same barriers to expanding their network footprint and are therefore likely to be as limited in their prospects for growth as TWTC.

Nor is there any basis for concluding that cable companies or any other intermodal competitors serving Denver, Minneapolis, Phoenix or Seattle have achieved or could achieve a significant level of success in serving business customers. The clearest indication of cable operators' presence in the business market is the extent to which competitors like Eschelon and Cbeyond have lost customers to cable operators. Yet both companies' churn data, described in detail herein, demonstrates that cable operators are simply not competing in the provision of services to small and medium-sized business customers in the four MSAs at issue. Moreover, the limitations of the geographic reach and technical capabilities of the cable operators' networks, as the Commission has recognized, constrain their ability to serve business customers in the future.

Given the absence of facilities-based competition, it is clear that Qwest cannot meet the Section 10 standard for forbearance. Unbundling requirements are necessary to ensure that Qwest's business retail and wholesale rates are just and reasonable, that consumers are protected against the abuse of Qwest's market power and that the public interest is served. Qwest's conduct in Omaha is obviously a cautionary tale in this regard. As McLeodUSA has explained, Qwest has exploited its new freedom from regulation in that market to increase the prices McLeodUSA pays for DS-0 and DS-1 loops, making it apparently impossible for McLeodUSA either to sustain its presence in the market or even to sell its assets in the market. Absent intramodal competition from McLeodUSA or similarly situated carriers, Omaha businesses will likely have no alternative to Qwest or those businesses lucky enough to have Cox as an

alternative will be forced to purchase service in a duopoly market. As the Commission has recognized, Section 10 forbearance is inappropriate in markets characterized by such conditions.

Competition and consumer welfare in the four MSAs at issue here will suffer the same fate if the instant petitions are granted. For example, Eschelon conducted a study to determine the consequences of forbearance in all four of these markets. Based on the conservative assumption that the elimination of unbundling would cause Qwest to require that Eschelon pay Qwest's special access prices for DS-1 loops applicable under Qwest's standard discount plan and Qwest's post-forbearance Omaha price for DS-0 loops, Eschelon determined that it would be placed in an unsustainable price squeeze. In all four markets, Eschelon would experience **[proprietary begin]** **[proprietary end]** for services it provides via DS1 EEL and DS-0 loops and would experience **[proprietary begin]** **[proprietary end]** for services it provides via stand-alone DS1 loops. Moreover, forbearance would also enable Qwest to unilaterally increase prices for transport facilities because, as discussed herein, Eschelon's study of the wholesale transport market in the four MSAs at issue reveals that Qwest is the only wholesale provider of transport in numerous central offices in which Eschelon is collocated. Accordingly, eliminating Qwest's unbundling obligations in the Denver, Minneapolis, Phoenix and Seattle MSAs is flatly inconsistent with sound public policy and the Section 10 standard.

II. THE COMMISSION MUST APPLY THE APPROPRIATE ANALYTICAL FRAMEWORK WHEN CONSIDERING THE QWEST FORBEARANCE PETITIONS.

In its petitions, Qwest seeks forbearance from, among other things, loop and transport unbundling. Under Section 10, forbearance shall be granted only where (1) a legal requirement

is no longer necessary to ensure the "charges, practices" and "classifications" of service offered by a carrier are just, reasonable, and not unjustly or unreasonably discriminatory; (2) the legal requirement is no longer necessary for the protection of consumers; and (3) a grant of forbearance comports with the public interest.[3] In assessing forbearance petitions similar to the ones at issue here, the Commission has focused on whether competition is sufficient to satisfy this standard in the absence of the unbundling obligations for which forbearance is sought.[4] In conducting this analysis with regard to the four petitions at issue in this proceeding, the Commission must utilize appropriate geographic and product markets, and it must grant forbearance only where sufficient facilities-based competition has taken root in the relevant market. In this regard, the Commission's unbundling analysis in particular must be informed by its own precedent, its past mistakes in granting forbearance based on predictive judgments that have been proven to be incorrect, and sound competition policy.

First, there is now little controversy that the appropriate geographic market for reviewing petitions for forbearance from unbundling local transmission facilities is no larger than individual wire centers. The Commission adopted wire centers as the geographic market for assessing unbundled network element ("UNE") loop forbearance petitions in both Omaha and Anchorage. *See Omaha Order* ¶¶ 60-61; *Anchorage Order* ¶¶ 14-16. In both *Orders*, the

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[3] 47 U.S.C. § 160(a)(1)-(3).

[4] *See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd. 19415, ¶ 1 (2005) ("*Omaha Order*"); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended, for Forbearance from Section 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd. 1958, ¶¶ 27-30 (2007) ("*Anchorage Order*").

Commission rejected ILEC requests that it utilize a larger geographic area. There is no basis for departing from this approach here. The large geographic areas covered by the four MSAs for which Qwest seeks forbearance all appear to contain "substantial topographical and density variations" and are not subject to uniform levels of competitive entry. *Anchorage Order* ¶ 15.

Second, it is critical that the Commission adopt and consistently utilize appropriate product markets for its analysis. This means that the Commission should assess the extent to which competition, including intermodal competition, exists with regard to "each loop type"[5] and each transport type. As the Commission stated in the *Anchorage Order*, this "remains the best way to structure [the] forbearance analysis." *Id.* ¶ 13. In conducting each product-specific analysis, the Commission has appropriately emphasized the need to analyze the extent to which competitors can provide services that are "substitutes" for ILEC services in the absence of UNEs. *See Omaha Order* ¶ 65. This means that the Commission must separately analyze the extent to which facilities-based competition exists at both the retail and wholesale levels for the services that ILECs provide *via* DS-0 loops (including xDSL services demanded by small business customers), DS-1 loops, and DS-3 loops as well as DS-1 and DS-3 transport.

It is of course not enough to describe the appropriate geographic and product markets. The Commission must actually conduct a separate analysis for each relevant market as appropriate. Unfortunately, the Commission failed to do so in either the *Omaha Order* or *Anchorage Order*. For example, in the *Omaha Order*, the Commission relied on aggregate

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[5] *See Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533, ¶ 210 (2005) ("*TRRO*").

numbers of DS-0, DS-1 and DS-3 circuits sold by competitors to businesses across the nine wire centers in which it granted forbearance. *See id.* ¶ 69. But aggregate data across multiple wire centers offers no basis for granting forbearance in any particular wire center where competition for one or all of these circuits could be non-existent or *de minimis*. Similarly, in both the *Omaha Order* and the *Anchorage Order*, the Commission relied on aggregate data regarding cable network coverage for both residential and business customers (*see Omaha Order* ¶ 69; *Anchorage Order* ¶ 21), but such average data offers no reliable indication of a cable operator's network coverage for either the circuits demanded by residential customers or the circuits demanded by business customers. Furthermore, the Commission relied on Cox Communications Inc.'s ("Cox's") success in the residential market as a basis for predicting that it would have similar success in the business market (*see Omaha Order* ¶ 66), without offering any basis for concluding that this would be the case. The conflation of separate markets in this manner is flatly inconsistent with the Commission's stated objective of separately analyzing the extent to which competitors' facilities, and the services they provide over those facilities, comprise "substitutes" of "each loop type" for which forbearance was sought. The Commission must not repeat this mistake in the instant proceeding.

Third, forbearance should not be granted in any relevant market unless facilities-based competitors' *end user connections* within such market are ubiquitous enough to ensure that Qwest's price and non-price conduct will be disciplined absent unbundling obligations or dominant carrier regulation. For example, in both the *Omaha Order* and *Anchorage Order*, the Commission granted forbearance from Section 251(c)(3) unbundling obligations only in wire centers in which at least one intermodal competitor was offering service over its own "extensive

last mile facilities." *Omaha Order* ¶ 59; *see also Anchorage Order* ¶ 31 (applying "extensive" intermodal coverage standard because of "the importance facilities-based last-mile deployment plays in lessening the need for regulatory intervention"). The Commission has concluded that granting forbearance in wire centers "where no competitive carrier has constructed substantial competing 'last mile' facilities is not consistent with the public interest and likely would lead to a substantial reduction in the retail competition." *Omaha Order* ¶ 60.

The Commission's measure for determining whether an intermodal competitor's last mile facilities have achieved "extensive" or "substantial" presence in a wire center and in a product market is the "coverage" of end users. That is, a particular customer location is deemed to count toward the requirement of "extensiveness" or "substantiality" only where the intermodal competitor "uses its own network, including its own loop facilities, through which it is willing and able, within a commercially reasonable time, to offer the full range of services that are substitutes for the incumbent LEC's local service offerings." *Omaha Order* n.156; *see Anchorage Order* ¶ 32 (applying coverage standard). Accordingly, an intermodal competitor's network does not "cover" a customer location unless the competitor is able to serve that location with the full range of services offered in the relevant product market in a timeframe that is equal to or less than the time it takes for a reasonably efficient competitor to provide such services. Furthermore, the intermodal competitor must have substantial enough coverage in the wire center that "all of the customers capable of being served by [the ILEC] from [a] wire center will benefit from competitive rates."[6]

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[6] *Omaha Order* ¶ 69. In the *Anchorage Order*, the Commission inexplicably seemed to depart from this standard and concluded that GCI's network covered customer locations that GCI would

But ubiquitous "coverage" by a single intermodal competitor by itself is not enough to meet the requirements of Section 10 for either the retail or the wholesale market. The Commission has held that the Section 10 standard is only met in the retail market if the intermodal competitor has demonstrated substantial success in winning retail market share by providing services over its own network. *See Omaha Order* ¶ 64, n.177, ¶ 69; *see also Anchorage Order* ¶ 28.

Moreover, in the *wholesale* market, a single facilities-based competitor is insufficient to meet the requirements of Section 10. As the Commission explained, it is critical that facilities-based wholesale competition "minimize[] the risk of duopoly and of coordinated behavior or other anticompetitive conduct." *See Omaha Order* ¶ 71; *see also Anchorage Order* ¶ 46 (relying on continued rate regulation of ACS to prevent the development of "an impermissible duopoly"). To ensure this outcome, the record must support the conclusion that there is enough facilities-based wholesale competition so that the ILEC has "very strong market incentives" to offer loops and transport on a wholesale basis to competitors on terms and conditions that allow efficient competitors to compete even if UNEs are eliminated. *Omaha Order* ¶ 81; *see Anchorage Order* ¶¶ 39-42 (relying on continued regulation to assuage concerns regarding the adequacy of

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only be able to serve after it completed its network upgrade, which will take one-to-two years. *See id.* ¶ 36, n.114. Incredibly, the Commission even went so far as to suggest to GCI ways in which it could serve customers over its existing facilities. *See id.* n.122. Nevertheless, later in the *Anchorage Order*, the Commission candidly expressed "concerns" that, in fact, GCI "is unable to provide symmetric high-speed service over its cable plant or otherwise unable to provide particular services to particular customers." *Id.* ¶ 41. In any event, the Commission emphasized that market conditions and GCI's participation in the market in Anchorage are "unique." *Id.* Thus, the Commission's arbitrary finding that GCI "covers" customer locations that it cannot serve for one or two years should have no bearing on the instant petitions.

competition in Anchorage). In determining whether this is the case, the Commission may not infer from the presence of a cable operator's loop and transport facilities that others could deploy such facilities.[7] The Commission also may not rely on the availability of special access or Section 271 UNEs as a basis for eliminating UNEs. *See TRRO* ¶¶ 46-63.

Again, the Commission must consistently apply these standards. It has not done so in the past. For example, rather than conduct an analysis of the competitiveness of the wholesale market in Omaha, the Commission relied on a baseless "predictive judgment" that the presence of a single competitor—a cable operator—with limited network coverage among business customers would give Qwest the incentive to offer competitors access to DS-0, DS-1 and DS-3 loops and DS-1 and DS-3 transport needed to serve business customers on reasonable terms and conditions that would support efficient competitive entry. Not surprisingly, this predictive judgment has proven to be incorrect, as explained in Section IV.A *infra*. McLeodUSA's experience in Omaha since the elimination of UNEs illustrates the need for the Commission to ensure that higher levels of facilities-based wholesale competition exist than was the case in Omaha before eliminating unbundled loops and transport needed to serve businesses.

Finally, the Commission must ensure that interested parties have a meaningful opportunity to assess and comment on data regarding facilities-based entry in the relevant markets. As explained below, Qwest offers little of substance to support its petitions. This is in

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[7] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Report and Order, 18 FCC Rcd. 16978, ¶ 310 (2003), *subsequent history omitted* ("*TRO*") (deployment of facilities by intermodal competitors that benefit from "unique" advantages is largely irrelevant to whether other competitors could efficiently deploy the similar facilities).

part due to the paucity of competition in the relevant markets. But the Commission will likely seek information from the few facilities-based competitors, in particular, cable companies, as part of its assessment of the merits of the Qwest petitions. If so, the Commission must ensure that such information is made available to interested parties soon enough that companies and their outside experts have a meaningful opportunity to analyze that information and submit that analysis into the record. The D.C. Circuit has consistently held that failing to make critical factual information available to interested parties on a timely basis in a rulemaking proceeding violates the requirements of the Administrative Procedure Act ("APA"), *see* 5 U.S.C. § 553(c), and is reversible error. *See, e.g., Doe v. Rumsfeld*, 341 F. Supp. 2d 1, 13-14 (D.D.C. 2004) (citing *Conn. Light and Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir. 1982); *Gerber v. Norton*, 294 F.3d 173, 179 (D.C. Cir. 2002) (same); *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994) (same).

III. BY ALL AVAILABLE MEASURES, QWEST RETAINS OVERWHELMING MARKET POWER OVER LOCAL TRANSMISSION FACILITIES NEEDED TO SERVE BUSINESS CUSTOMERS.

The available evidence demonstrates that Qwest continues to control the only viable transmission facility for serving the vast majority of business locations in its territory. This is true, even if one accounts for both intramodal and intermodal (including cable) competitors. Moreover, Qwest has offered no basis in its petitions to doubt that this is the case with regard to any wire center in the four MSAs at issue in which it is still obligated to provide unbundled DS-0, DS-1 or DS-3 loops or DS-1 or DS-3 transport needed to serve business customers. Even in the small business market, in which cable companies have apparently made some modest competitive entry by offering substitutes for services such as xDSL that rely on DS-0 unbundled

loops, there is no evidence that a viable wholesale market would exist if unbundled DS-0 loops were eliminated.

Qwest's control of bottleneck local transmission facilities (loops and transport) demonstrates that the continued availability of unbundled DS-0, DS-1 and DS-3 unbundled loops and DS-1 and DS-3 transport is (1) "necessary to ensure that the charges, practices," and "classifications" of services provided to small, medium and large businesses in the six markets at issue are "just, reasonable" and "not unjustly or unreasonably discriminatory;" and (2) "necessary for the protection of consumers" against higher prices charged by Qwest and foregone competition and innovation from UNE-based competitors. Denial of Qwest's request for UNE forbearance is also in the public interest for the similar reason that granting the request would lead to less competition, higher prices and less innovation for all business customers in all of the markets in which Qwest seeks this relief.

A. The GAO And The FCC Itself Have Concluded That There Is No Basis For Granting Qwest's Petitions For Forbearance From Unbundling Loops Or Transport Needed To Serve Businesses.

The Government Accountability Office ("GAO"), in a recent report on the market for dedicated access services, and the FCC, in the *TRO*, *TRRO* and to some extent in the recent *Qwest Sunset Order*, have examined the competitiveness of the local transmission market generally, and in the Qwest region specifically. Both of these agencies have reached the same conclusion: Qwest has overwhelming market power over the upstream loop and transport inputs needed to serve small, medium and large business customers. Importantly, both the GAO's and FCC's conclusions accounted for the presence of cable, wireless and other intermodal competitors.

In a November 2006 report, the GAO determined that competitors have deployed few facilities in Qwest's markets or nationwide. The report found that, based on data from third-party telecommunications industry data vendors GeoResults and Telcordia, competitors have deployed transmission facilities to less than five percent of the buildings demanding at least DS-1 level service in the 16 markets studied.[8] As the GAO found, nearly all of the loops that competitors have deployed are well above the DS-1 level of capacity. In light of long-standing entry barriers, the GAO concluded that "wireline facilities-based competition itself may not be a realistic goal for some segments of the market for dedicated access . . . . Where demand for dedicated access is less than 3 or 4 DS-1's [sic], it would appear unlikely that any competitor would extend its network for that business." *GAO Report* at 42. Moreover, the GAO emphasized that its study took into account *both intramodal and intermodal competition* (including cable companies and wireless providers). *See id.* at 47.

The GAO studied three of the four Qwest MSAs at issue here. It found that competitors had deployed loop facilities to only to 5.7 percent of the commercial buildings with demand of DS-1 or greater in Minneapolis, 3.7 percent of such buildings in Phoenix, and 3.8 percent of such buildings in Seattle. *Id.* at 20. As the GAO explained, most of the loops deployed by competitors provide two DS-3s or higher of capacity. As a result, competitors likely have deployed loops to well below 5.7, 3.7, and 3.8 percent of the customer locations in Minneapolis,

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[8] *See GAO, FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-80, at 22 (Washington, D.C., Nov. 2006) ("*GAO Report*"). The GAO acknowledged that GeoResults data could overcount or undercount the number of buildings served by CLECs and one "price-cap incumbent" suggested that GAO may be undercounting by as much as 30 percent. Even if this were the case, "competitive alternatives exist in a relatively small subset of buildings." *Id.*

Phoenix, and Seattle, respectively, that are most relevant to this proceeding—those with demand of a single DS-3 of capacity or less.

Of course, the FCC reached very similar conclusions regarding ILECs' market power in the *TRO* and the *TRRO*. In the *TRO*, the Commission found that competitors had deployed loop facilities to only three to five percent of the commercial buildings nationwide.[9] Moreover, in the *TRRO*, the FCC found that it is "rarely if ever economic" for a reasonably efficient competitor to construct DS-1 loops in the vast majority of wire centers in the country. *TRRO* ¶ 166. And, as Qwest itself has recently acknowledged, the Commission took into account "the role of intermodal competition" in the *TRRO*.[10]

As if the findings of the GAO Report, *TRO*, and *TRRO* were not proof enough, as recently as March 2007, in the *Qwest Sunset Order*,[11] this Commission held that Qwest retains a monopoly over essential local transmission facilities:

> Qwest has failed . . . to present persuasive evidence that it no longer possesses exclusionary market power within its region as a result of its control over ubiquitous telephone exchange service and exchange access network. We therefore assume, for the purposes of this proceeding, that Qwest continues to possess exclusionary market power within its region by reason of its control over these bottleneck access facilities.

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[9] *See TRO* ¶ 298 n.856 (stating that both "competitive LECs and incumbent LECs report that approximately 30,000, *i.e.*, between 3% to 5%, of the nation's commercial office buildings are served by competitor-owned fiber loops").

[10] *See* Comments of Qwest Communications Int'l, Inc., *Special Access Rates for Price Cap Local Exchange Carriers*, WC Dkt. No. 05-25, at 7 & n.13 (filed Aug. 8, 2007) (citing *TRRO*).

[11] *In the Matter of Petition of Qwest Communications, Int'l Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules As They Apply After Section 272 Sunsets*, Memorandum Opinion and Order, 22 FCC Rcd. 5207, ¶ 47 (rel. Mar. 9, 2007) ("*Qwest Sunset Order*").